

**C. What should be the appropriate level of intrastate discounts after December 31, 1998, and how should such discounts be funded?**

23. Noting that the FCC plans to complete its review of universal service in 2001, BA-Del recommended that the discount matrix remain in effect for at least three years. BA-Del asserted that three years would allow time for the various stakeholders to gain experience and would provide the time needed to evaluate the program. (Exh. 10 at 4-5.) AT&T recommended that the Commission monitor the situation and revisit, in one year, the issues of what level of subsidy will be necessary and how the subsidy will be funded.

24. Other participants recommended that the Commission form an advisory group that would report to the Commission regarding the appropriate level of intrastate discounts after December 31, 1998. In total, the participants suggested that the advisory group include representatives from: the Task Force, the Department of Education, the Division of Libraries, DCET, the Budget Office, the Office of Information Services/Telecommunications Management and, generally, the library and school communities.

25. BA-Del supported the formation of an advisory group and suggested that the group include representatives from the telecommunications carriers. (Exh. 15 at 1-2.) To allow enough time for sufficient data to become available, BA-Del urged the Commission to commence an evaluation no earlier than January 1, 2000, with a target completion date of December 31, 2000.

26. I support the ongoing evaluation of the discount program and I recommend that Staff consult with the stakeholders to develop an internal plan or to

create an advisory group to track the progress of the program and to evaluate the need for modifications to the rules or discount matrix.

**D. Other issues.**

27. BA-Del suggested that, rather than adopt Staff's proposed rules, which are substantially similar to the federal rules, the Commission should simply note that it intends to follow the federal rules. (Exh. 10 at 5.) In this way, as the federal rules are amended from time to time, those changes will automatically take effect in Delaware.

28. Staff responded that the Administrative Procedures Act and the Delaware Register of Regulations Act may not allow the Commission to adjust its rules without compliance with procedural requirements. (Tr. at 55.) I concur and, therefore, recommend that the Commission decline BA-Del's suggestion to adopt rules which automatically change to conform to future FCC amendments.

29. BANM recommended that the Commission, in its order, recognize that BANM, as a provider of cellular radio telecommunications service is not required to file tariffs implementing the proposed rate discounts. (Exh. 5 at 2.) BANM argues that: (1) as a provider of cellular services, BANM is excluded from Commission jurisdiction (26 Del. C. §§ 102(2) & 202(c)); (2) as a commercial mobile radio service ("CMRS") provider, BANM is exempted by federal law from state rate regulation; and (3) the Commission does not have authority to regulate the rate changes for cellular service rendered by BANM (citing FCC caselaw.)

30. Neither Staff nor the other participants addressed the extent of PSC jurisdiction over CMRS providers or its impact, if any, on the proposed rules. I

recommend that the Commission defer the question of its jurisdiction over CMRS providers until it becomes a contested issue squarely before the Commission.

31. The Delaware Division of Libraries expressed concern over the rules dealing with consortia formed for purposes of seeking competitive bids. (Tr. at 60-62; Exh. 12 at 1-3, citing Rule 2.1(d).) The Division of Libraries asserted that the following rule will present a problem for the Kent County Library System consortia (“KentNet”):

Eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for intrastate services under these rules unless the pre-discount prices of any intrastate services that such consortia receives from a service provider are generally tariffed rates.

(Rule 2.1(d).)

32. The Division of Libraries explained that KentNet, which provides library automation to all the public libraries in Kent County, includes one “ineligible” library, the Wesley College Library. (Exh. 12 at 2.) Currently, KentNet takes telecommunications services under a favorable rate and thus, its pre-discount rate is not a “generally tariffed rate.” Consequently, the KentNet consortia may face a higher pre-discount rate and, thus, a higher post-discount rate as a consequence of the membership of the Wesley College Library. The Division of Libraries argues that the FCC did not intend to discourage the formation of consortia among libraries and requested the Commission to investigate this issue in a universal service proceeding. (Id. at 2-3; Tr. at 61.)

33. Staff addressed the concern of the Division of Libraries regarding consortia and recommended that the Commission investigate the matter in its universal

service proceeding (PSC Regulation Docket No. 48). (Tr. at 44-45.) I support Staff's recommendation in this matter.

**V. RECOMMENDATIONS**

34. In summary, and for the reasons stated above, I propose and recommend the following to the Commission:

- A) That the Commission affirm its adoption, in PSC Order No. 4555, dated July 15, 1997, of the federal discount matrix to be applied to eligible intrastate telecommunications services and facilities purchased by eligible schools, school districts, libraries, or library consortia; and
- B) That the Commission adopt Staff's proposed "Interim Rules for the Determination of Intrastate Discounts for Services Provided to Elementary and Secondary Schools and Libraries for Purposes of the Receipt of Federal Universal Service Support" as revised, attached to the original hereto as Exhibit "A".

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "William F. O'Brien", written over a horizontal line.

William F. O'Brien  
Hearing Examiner

Dated: August 28, 1997

## **EXHIBIT “B”**

### **INTERIM RULES FOR THE DETERMINATION OF INTRASTATE DISCOUNTS FOR SERVICES PROVIDED TO ELEMENTARY AND SECONDARY SCHOOLS AND LIBRARIES FOR PURPOSES OF THE RECEIPT OF FEDERAL UNIVERSAL SERVICE SUPPORT**

#### **Section 1: General**

- 1.1 Basis and purpose**
- 1.2 Duration**
- 1.3 Intended use of federal universal service support**
- 1.4 Terms and definitions**

#### **Section 2: Eligible Institutions and Supported Services**

- 2.1 Eligibility**
- 2.2 Supported services**
- 2.3 Other supported special services**
- 2.4 Requests for service**

#### **Section 3: Intrastate Discounts**

- 3.1 Discounts**

#### **Section 4: Duties of Eligible Institutions and Service Providers**

- 4.1 Ordering and bidding for services**
- 4.2 Resale**
- 4.3 Support**
- 4.4 Record keeping**

#### **Section 5: Services provided by non-telecommunications carriers.**

- 5.1 Support for non-telecommunications carriers**

## **Section 1: General**

### **1.1 Basis and purpose.**

(a) Under the provisions of 47 U.S.C. § 254(h)(1)(B), all telecommunications carriers serving a geographic area must, upon receipt of a bona fide request for services falling within the definition of universal service, provide such services to elementary schools, secondary schools, and libraries at rates less than the amounts charged for similar services to other parties. The discount provided for such services is recovered by the carrier either offsetting such amount against the carrier's obligation to contribute to a universal service support mechanism or recovering reimbursement from a universal service support mechanism. By the same provision, the states are charged with determining the amount of such discount for intrastate services. These rules set the discounts for intrastate services provided by telecommunications carriers to eligible schools and libraries within Delaware.

(b) These rules are adopted for the purpose of allowing telecommunications carriers to receive *federal* universal service support for both interstate and intrastate services provided to eligible schools and libraries. *See* 47 C.F.R. § 54.505(e)(1).<sup>1</sup> These rules do not provide for, nor do they create, a state universal service support funding mechanism. The amount of support available for services provided to eligible schools and libraries is to be determined by the rules adopted by the Federal Communications Commission to implement the *federal* universal service support mechanism.

### **1.2 Duration.**

These rules shall govern the intrastate discounts for services provided by telecommunications carriers to eligible schools and libraries for the period from the effective date of these rules until December 31, 1998. The Commission may hereafter alter, amend, or repeal these rules and may extend the expiration date for these rules.

### **1.3 Intended use of federal universal service support.**

A carrier that receives federal universal service support for intrastate services shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the federal support is intended.

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<sup>1</sup>For purposes of these rules, citations to provisions in the Code of Federal Regulations shall be to amendments and additions made by the Report and Order (FCC 97-157) in Federal-State Board on Universal Service, CC Dckt. No. 96-45 (rel. May 8, 1997).

#### 1.4 Terms and definitions.

(a) An "*Elementary school*" is a non-profit institutional day or residential school that provides elementary education, as determined by state law.

(b) "*Information service*" is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(c) "*Internet access*" includes the following elements:

- (1) the transmission of information as common carriage;
- (2) the transmission of information as part of a gateway to an information service, when that transmission does not involve the generation or alteration of the content of information, but may include data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access information services, and that do not affect the presentation of such information to users; and
- (3) electronic mail services (e-mail).

(d) "*Existing Contract*" For the purposes of section 4.1, an "existing contract" is any signed contract for services eligible for discounts pursuant to this subpart between an eligible school or library as defined under section 2.1 and a service provider that either:

(1) was signed prior to November 8, 1996, or

(2) is limited to services provided before December 31, 1998 and was signed on or after November 8, 1996 but before the first date that the universal service competitive bidding system described in section 2.4 is operational. The competitive bidding system will be deemed to be operational when both the universal service Administrator is ready to accept and post request for service from schools and libraries on a website and that website may be used by potential service providers.

(e) "*Internal Connections*" includes items such as routers, hubs, network file servers, and wireless local area networks and their installation and basic maintenance needed to switch and route messages within a school or library. A given service is eligible for support as a component of the institution's internal connections only if it is necessary to transport information to individual classrooms.

(f) "*Intrastate telecommunication*" is a communication or transmission from within Delaware to a location within Delaware. "*Intrastate transmission*" is the same as intrastate telecommunication.

(g) A "*library*" includes:

(1) a public library;

(2) a public elementary school or secondary school library;

(3) an academic library;

(4) a research library which, for the purposes of this definition, means a library that:

(A) makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and

(B) is not an integral part of an institution of higher education; and

(5) a private library, but only if the Public Service Commission, with the advice of the State Librarian, determines that the library should be considered a library for the purposes of this definition.

(h) A "*library consortium*" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of school, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.

(i) "*Lowest corresponding price*" is the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.

(j) "*National school lunch program*" is a program administered by the U.S. Department of Agriculture that provides free or reduced price lunches to economically disadvantaged children.



(k) The "*pre-discount price*" means the price the service provider agrees to accept as total payment for its telecommunications or information services. Such amount is the sum of the amount the service provider expects to receive from the eligible school or library and the amount it expects to receive as reimbursement from the federal universal service support mechanisms because of the discounts provided herein.

(l) A "*secondary school*" is a non-profit institutional day or residential school that provides secondary education, as determined by state law. A secondary school does not offer education beyond grade 12.

(m) "*Telecommunications*" is the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(n) A "*telecommunications carrier*" is any provider of telecommunications services except that such term does not include aggregators of telecommunications services as defined by 47 U.S.C. § 226. This definition includes cellular mobile radio service (CMRS) providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private mobile radio service (PMRS) providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

(o) "*Telecommunications service*" is the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

## **Section 2: Eligible Institutions and Supported Services**

### **2.1 Eligibility**

(a) Telecommunications carriers shall be eligible for federal universal service support under these rules for providing supported intrastate services to eligible schools, libraries, and consortia including those entities.

(b) *Schools.*

(1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 8801(14), or "secondary school," as defined in 20 U.S.C. § 8801(25), and not excluded hereafter, shall be eligible for discounts on telecommunications and other supported services and facilities under these rules.

(2) Schools operating as for-profit businesses shall not be eligible for discounts under these rules.

(3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under these rules.

(c) *Libraries*

(1) Only libraries eligible for assistance from the Division of Libraries [a State library administrative agency] under the Library Services and Technology Act (Pub. L. No. 104-208) and not excluded hereafter shall be eligible for discounts under these rules.

(2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under these rules.

(3) Libraries operating as for-profit businesses shall not be eligible for discounts under these rules.

(d) *Consortia.*

(1) For purposes of seeking competitive bids for telecommunications services pursuant to the provisions of 47 C.F.R. § 54.504, schools and libraries eligible for support under these rules may form consortia with other eligible schools and libraries, with health care providers eligible under 47 U.S.C. § 254(h)(1)(A), and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under the federal universal support mechanism. Eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for intrastate services under these rules, unless the pre-discount prices of any intrastate services that such consortia receives from a service provider are generally tariffed rates.

(2) For consortia, discounts under these rules shall apply only to the portion of eligible telecommunications and other supported services used by the eligible schools and libraries.

(3) Appropriate state agencies may receive discounts on the purchase of telecommunications and information services that they make on behalf of, and for, the direct use of eligible schools and libraries.

(4) Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries - on their own or as part of a consortium. Such records shall be available for public inspection.

## **2.2 Supported services.**

For the purposes of this rules, supported services provided by telecommunications carriers include all commercially available telecommunications services.

## **2.3 Other supported special services.**

For the purposes of these rules, other supported special services provided by telecommunications carriers include Internet access and installation and maintenance of internal connections.

## **2.4 Requests for Service.**

- (a) All eligible schools, libraries, and consortia composed of such entities shall participate in a competitive bidding process, pursuant to the requirements established in 47 C.F.R. § 54.504. Such competitive bidding process shall be undertaken in compliance with any applicable provisions of state law pertaining to procurement of services..
- (b) Schools, libraries, and eligible consortia wishing to receive discounts for eligible services under the federal support mechanism for intrastate services shall submit requests for services and facilities in compliance with the requirements set forth in 47 C.F.R. §§ 54.504, 54.507(d), & 54.509(a).
- (c) Schools, libraries, eligible consortia, and service providers may present to the Public Service Commission complaints regarding intrastate rates if they reasonably believe that the lowest corresponding price is unfairly high or low.
  - (1) Schools, libraries, and consortia may request lower rates if the rate offered by the provider does not represent the lowest corresponding price.
  - (2) Service providers may request higher rates if they can show that the lowest corresponding price is not compensatory, because the relevant school, library, or consortium is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

### **Section 3: Intrastate Discounts**

#### **3.1 Discounts.**

(a) Discounts for eligible schools and libraries shall be set as a percentage discount from the pre-discount price.

(b) The discounts available to eligible schools and libraries shall range from twenty percent (20%) to ninety percent (90%) of the pre-discount price for all eligible services provided by eligible providers. The discounts available to a particular school, library, or consortium of only such entities shall be determined by indicators of poverty and high cost.

- (1) For schools and school districts, the level of poverty shall be measured by the percentage of their student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. School districts applying for eligible services on behalf of their individual schools may calculate the district-wide percentage of eligible students using a weighted average. For example, a school district would divide the total number of students in the district eligible for the national school lunch program by the total number of students in the district to compute the district-wide percentage of eligible students. Alternatively, the district could apply on behalf of individual schools and use the respective percentage discounts for which the individual schools are eligible.
- (2) For libraries and library consortia, the level of poverty shall be based on the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism in the public school district in which they are located. If the library is not in a school district then its level of poverty shall be based on an average of the percentage of students eligible for the national school lunch program in each of the school districts that children living in the library's location attend. Library systems applying for discounted services on behalf of their individual branches shall calculate the system-wide percentage of eligible families using an unweighted average based on the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program in the public school district in which they are located for each of their branches or facilities.

(3) Schools and libraries are classified as "urban" or "rural" based on location in an urban or rural area, according to the following designations.<sup>2</sup>

(i) Schools and libraries located in New Castle County and Kent County are designated as urban.

(ii) Schools and libraries located in Sussex County are designated as rural.

(c) The following matrix sets forth a discount rate to be applied to eligible intrastate services purchased by eligible schools, school districts, libraries, or library consortia based on the institution's level of poverty and location.

SCHOOLS & LIBRARIES DISCOUNT MATRIX		DISCOUNT LEVEL	
HOW DISADVANTAGED?		urban discount	rural discount
% of students eligible for national school lunch program			
< 1		20	25
1-19		40	50
20-34		50	60
35-49		60	70
50-74		80	80
75-100		90	90

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<sup>2</sup>The classifications are based on the criteria set forth in 47 C.F.R. § 54.505(b)(3). If, under that criteria, the classification of a county or an area within a county changes, the discounts should be based on the reclassification.

(d) Consortia applying for discounted services on behalf of their members shall calculate the portion of the total bill eligible for a discount using a weighted average based on the share of the pre-discount price for which each eligible school or library agrees to be financially liable. Each eligible school, school district, library, or library consortia will be credited with the discount to which it is entitled.

#### **Section 4: Duties and Rights of Eligible Institutions and Service Providers**

##### **4.1 Ordering and bidding for services**

(a) In selecting a provider of eligible services, schools, libraries, and eligible consortia shall carefully consider all bids submitted and may, to the extent permitted by state law, consider relevant factors other than the pre-discount prices submitted by providers.

(b) Providers of eligible services shall not charge schools, school districts, libraries, eligible consortia, and state agencies a price above the lowest corresponding price for supported services and facilities, unless the Public Service Commission finds that the lowest corresponding price for intrastate services is not compensatory.

(c) Schools and libraries bound by existing contracts for service shall not be required to breach those contracts in order to qualify for discounts under these rules during the period for which they are bound. This exemption from competitive bidding requirements, however, shall not apply to voluntary extensions of existing contracts.

##### **4.2 Resale**

(a) Eligible services provided at a discount under these rules shall not be sold, resold, or transferred in consideration of money or any other thing of value.

(b) The above prohibition on resale shall not bar schools, school districts, libraries, and library consortia from charging either computer lab fees or fees for classes in how to navigate over the Internet. There is no prohibition on the resale of services that are not purchased pursuant to the discounts provided in these rules.

##### **4.3 Support**

A telecommunications carrier providing services eligible for support under these rules shall receive an offset or reimbursement for the amount eligible for support from the federal universal service support mechanism in such amount as may be prescribed under the provisions of 47 C.F.R. §§ 54.507 to 54.515.

#### **4.4 Record keeping**

Schools and libraries shall maintain for their purchases, at discounted rates, of telecommunications and other supported services and facilities the kind of procurement records that they maintain for other purchases. Schools and libraries shall produce such records at the request of any auditor appointed by the Department of Public Instruction, the federal universal service Administrator, or any state or federal agency with jurisdiction. Schools and libraries shall be subject to random compliance audits to evaluate what services they are purchasing and how such services are being used.

### **Section 5: Services Provided by Non-telecommunications Carriers**

#### **5.1 Support for non-telecommunications carriers**

(a) Non-telecommunications carriers, not subject to the jurisdiction of the Public Service Commission, may also be eligible to receive federal universal service support for providing eligible covered services for eligible schools, libraries, and consortia, including those entities.

(b) Non-telecommunications carriers shall be eligible for federal universal service support for providing Internet access and installation and maintenance of internal connections.

(c) The terms, conditions, and amount of such support shall be determined pursuant to the provisions of 47 U.S.C. § 254(h)(2)(A) and 47 C.F. R. §§ 54.505 to 54.511.